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Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 77.

HARRIET C. BINNEY, FREDERIC CUNNINGHAM AND CONSTANCE C. PERTZOFF ET AL., *Appellants*,

v.

HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS, *Appellee.*

APPEAL FROM THE PROBATE COURT OF THE COUNTY OF NORFOLK, COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION FOR THE COMMONWEALTH OF MASSACHUSETTS.

This is an appeal from a final decree of the Probate Court of Norfolk County, Commonwealth of Massachusetts, entered in accordance with a rescript of the Supreme Judicial Court of Massachusetts, denying the petition for abatement of inheritance taxes. The opinion of the Supreme Judicial Court was rendered on January 7, 1936, Massachusetts Advance Sheets, 1936, page 153, and the final decree of the Probate Court was entered on January 20, 1936.

The succession taxes in question were imposed in respect to the estate of Hetty S. L. Cunningham, who died intestate on August 20, 1931, and were assessed and paid upon four

different interests: *first,* Mrs. Cunningham's individual estate, which estate amounted to $299,241.58, and concerning which assessment there is no dispute; *second,* the interests passing to the four children of the intestate under a trust created by a deed of the intestate in 1877; *third,* the interests passing to these four children under a trust created in 1862 by Amos A. Lawrence; and *fourth,* property passing to these four children under the will of Sarah E. Lawrence.

The appellee combined all these four interests for the determination of the rate and the amount of the tax, and the amount so certified by him has been paid in full by the appellants.

Statement of the Case.

Hetty S. L. Cunningham died August 20, 1931, intestate, leaving as her sole heirs at law her four children, Harriet C. Binney, born June 27, 1885; Constance C. Pertzoff, born September 8, 1886; Frederic Cunningham, born December 28, 1888; and Susannah C. Coolidge, born March 19, 1890. These four children individually, and with one of them, Frederic Cunningham, as administrator of the estate of the said Hetty S. L. Cunningham, and the trustees of the will of said Sarah E. Lawrence, are the petitioners.

The material terms of the three trusts under which the appellee contends that each of the four children took an interest on the death of their mother on August 20, 1931, and upon which a succession tax on such interests was levied and collected by him are now briefly stated.

I.

THE TRUST CREATED BY THE INTESTATE IN 1877.

On January 26, 1877, the intestate, then a single woman whose name was Hetty Sullivan Lawrence, conveyed cer-

tain property in trust by a deed which was duly recorded and which required the trustees "to pay the remaining, or nett, rents and income by quarter-yearly payments to the said Hetty Sullivan Lawrence, in every year during her natural life . . . And from and after the death of the said Hetty, to pay the said nett rents and income, by quarter-yearly payments, to and among such of the children of the said Hetty as may be living at the time of payment, in equal shares, and to the lawful issue, then living, of any *her* child then deceased, such issue taking by representation the share which such deceased child would have taken had he or she been living, until the expiration of twenty years next succeeding the death of said Hetty; and upon the expiration of said twenty years, to convey in fee simple and transfer the said trust-property, original and substituted, in equal shares, to and among the children, then living, of the said Hetty, and the lawful issues, then living, if any, her child then deceased, such issue taking, by representation, the share which such child would have taken had he or she been living. If at the death of the said Hetty, or at any time during the said twenty years next thereafter, no child or lawful issue of said Hetty be living, the trustees shall convey . . . the said trust-property . . . to the heirs at law of the said Amos A. Lawrence, if he have then deceased, and if he have not then deceased, to the heirs at law of the said Hetty" (R. 4, 5).

This trust does not contain any power to revoke or amend. The several life interests of the four children passing under this trust were valued by the appellee in amounts ranging from $4366.92 to $4512.48, and a succession tax at the rate of 4 per cent, totaling $709.63, was assessed upon these life interests, and the said amount, together with interest in the sum of $7.10, was paid to the Commonwealth on October 20, 1932. The interest passing to each child under this indenture was less than $10,000,

and consequently was not subject to any succession tax imposed by the Massachusetts statutes (G.L. c. 65), unless these interests were grouped with other interests, the value of which aggregated $10,000 or more (R. 17, 18).

II.

The Amos A. Lawrence Trust.

In 1862 Amos A. Lawrence, father of the intestate, created a trust for her benefit with the Massachusetts Hospital Life Insurance Company, which was accumulated until 1877, when the income thereof was thereafter paid to the intestate during her natural life. This trust further provided that, after the death of the intestate, the company would pay the principal and interest "to her Executors or Administrators in trust, and for the special use and benefit of such person or persons as the said Hetty may appoint by her last will and testament . . . In failure of such appointment then to be distributed by said Administrators among her children, if she should leave any, (the issue of a deceased child to have the same share their parent would have been entitled to)" (R. 21).

The intestate failed to exercise the power of appointment given to her in the indenture of trust (R. 18).

The appellee determined the value of the interests passing to her four children under this trust to be $20,766.20, and assessed a succession tax thereon at the rate of 4 per cent, amounting to $830.65, which tax, together with interest amounting to 55 cents, was paid by her administrator. The interest passing to each of these four children, being under $10,000, was not subject to any tax assessed under the Massachusetts statutes (G.L. c. 65), unless their said interests were united with another or other interests, the total value of which would be over $10,000 (R. 18).

III.

The Sarah E. Lawrence Trust.

In 1891 Sarah E. Lawrence, mother of the intestate, died leaving property in trust, the income of which was to be paid to each of her six children and the issue of any deceased child so long as any of the six children should live (two are now alive), and for twenty years after the death of the last surviving child the income was to be paid to the grandchildren and to their issue. This will further provided "that any one of my said six children may by his or her will, appoint the shares in which that part of the net income which is hereinbefore given to his or her children, living at the time of payment, and to the issue then living, of any such child then deceased, shall be apportioned among such children and issue, during the time between his or her death and the time fixed for the distribution of the trust property; and also the proportions in which that part of the trust property and fund which is hereinbefore given, in such final distribution, to his or her children, then living, and the issue then living of his or her children then deceased shall be divided among such children and issue" (R. 11).

This special testamentary power of appointment given to the intestate under the will of her mother was never exercised by her (R. 18, 19).

A succession tax at the rate of 4 per cent, totaling $2876.16, was levied by the appellee upon the interests of these four children passing under the will of Sarah E. Lawrence, and this tax, together with $65.67 interest, was paid to the Commonwealth. The value of the interests which passed to each of these children was approximately $18,000 and was, therefore, under G.L. c. 65, subject to a tax of 1 per cent, if this interest was considered by itself, separate and apart from the other interests received by

the children on account of the death of their mother, but, if this interest was united with the other interests received by them, the rate would be 4 per cent (R. 19).

Contentions of the Parties.

The appellants contend that the interests received by the four children under each of these three trusts were not of a taxable nature and, secondly, that the interests passing under the 1862 trust and property passing under the will of Sarah E. Lawrence could not be united with each other or with any other interests to determine the rate of taxation.

The appellee contends that the four children took interests under each of these three trusts; that such interests were all of a taxable nature and that he was authorized to unite these interests with each other and with the interest which each child received from the estate of the intestate for the purpose of determining the tax due upon the aggregate interest of each child.

Opinion Below.

This case was reserved for the determination of the Supreme Judicial Court upon the pleadings and an agreed statement of facts without decision by the Probate Court for the County of Norfolk (R. 22). The case was decided by the Supreme Judicial Court in an opinion reported *sub nom. Binney et al.* v. *Commissioner of Corporations & Taxation,* in 1936 Massachusetts Advance Sheets, page 153, and in 199 N.E. 528. This opinion is included in the present record (R. 24).

Jurisdiction.

The appellants, in accordance with paragraph one of rule 12 of the revised rules of this court, duly filed a statement disclosing the alleged basis of the jurisdiction of this court, and contended that this court had jurisdiction by virtue of section 237 (*a*) of the Judicial Code, as amended by the act of February 13, 1925, 43 Stat. 937, 28 U.S.C.A. sec. 344 (*a*), and this court, on June 1, 1936, made an order postponing further consideration of the question of jurisdiction until a hearing of the case upon the merits.

The appellee contends that whether a tax was lawfully imposed upon the interests passing by the failure of the intestate to exercise the powers of appointment given to her in the Amos A. Lawrence trust and the Sarah E. Lawrence trust was settled by *Saltonstall* v. *Saltonstall*, 276 U.S. 260, which upheld a similar construction of the same statute by the State court.

Whether the interests passing from the three trusts could be joined with the interests passing from the individual estate of the intestate, we submit, depended upon the State statute whose construction rested with the State court. Its interpretation thereon will be accepted by this court.

The appellee, however, concedes that, if the children took a vested interest under the trust created in 1877 by the intestate, so that nothing passed to them on her death, no tax could be imposed thereon.

Coolidge v. *Long*, 282 U.S. 582.

If the construction by the State court to the effect that nothing vested in the children until and upon the death of their mother, then the imposition of a succession tax was proper.

Argument.

The rights of the children under the trust of 1877 were not fully vested at the time it was created or when the children were born. At most, until the death of the intestate, they had but a contingent remainder, and at the death of their mother they succeeded for the first time to the full ownership, enjoyment and possession. The intestate had a general power of appointment under the trust of 1862 created by her father and a special power of appointment under the will of Sarah E. Lawrence. The intestate failed to exercise either power of appointment, so that at the mother's death, on August 20, 1931, it was then finally settled who were to take the appointed property and in what proportions. All of the property passed to the children at the same time and as a result of the same event, *i.e.*, the death of the intestate. All of the property came from the intestate individually or from a trust created by her in 1877 out of her own property and from the two remaining trusts as the donee of a power conferred upon her in each of these two trusts. The identity of ownership of the property as actual owner or as donee of a power of appointment warranted the appellee in joining all these interests for the purpose of determining the rate and amount of the tax.

I.

The Interests Passing under the 1877 Trust upon the Death of the Intestate were Taxable.

When the intestate created this trust in 1877, she reserved to herself a life estate in the net income, which, upon her death, then became payable for the succeeding twenty years to such of her children "as may be living at the time of payment, in equal shares, and to the lawful issue, then living, of any *her* child then deceased . . .

and upon the expiration of the said twenty years, to convey in fee simple and transfer the said trust-property, original and substituted, in equal shares, to and among the children, then living, of the said Hetty, and the lawful issue, then living, if any, her child then deceased," and, in the absence of any living child or issue, to the heirs at law of her father, otherwise her own heirs at law (R. 4, 5). None of the intestate's children were alive at the time the trust was made. The first child was born in 1885 and the last in 1890. If the entire beneficial interest in the trust had fully vested in the children during the lifetime of the said mother and were subject only to the latter's life interest in the income, then the gift was completed not later than the birth of the youngest child in 1890, and consequently nothing passed to them upon the death of their mother in 1931. The appellants contend that the matter is settled by *Coolidge* v. *Long*, 282 U.S. 582, and that no tax is due.

The nature and character of the interests conveyed to the children by the trust instrument is to be determined by the law of Massachusetts, where all the parties lived, where the property was situated, and where the terms of the trust were to be observed and performed and its provisions and conditions to be maintained and enforced, if necessary, under the law of Massachusetts and by its courts. The trust property, in the first instance, consisted entirely of real estate, which the record does not show was ever thereafter converted into personalty. The rights of the beneficiaries were governed by the laws of Massachusetts.

Orr v. *Gilman*, 183 U.S. 278.
Chanler v. *Kelsey*, 205 U.S. 466.
Moffitt v. *Kelly*, 218 U.S. 400.

It has always been the law in Massachusetts that remainders over, posited upon the occurrence of a certain

event and then only to those who will then be eligible by the terms of the instrument to take, constitute only contingent interests. Where a will or deed not only postponed the time of payment or the actual possession or enjoyment of property, but also prescribed certain qualifications for those who were to be the recipients, then it has been held in Massachusetts that no title or interest vested before the happening of the designated event, and not even then unless the beneficiary showed that he fitted the description of those permitted to take.

In *Nash* v. *Nash,* 12 Allen (Mass.) 345, a devise of a life estate to the testator's wife, and at her death "to such of my children as may be then living, share and share alike," gave the children only a contingent and not a vested interest during the life of their mother.

In *Smith* v. *Rice,* 130 Mass. 441, a trust in land reserving life estates to the grantors and then to one of the sons and the wife of the latter, with remainder over to certain children of the son and such other children of the son as shall then be living, it was held that the grandchildren took only a contingent remainder and "that the vesting of the title, legal or equitable, in possession or in right, in those of that class who are named, as well as in those who are not named, is contingent upon their surviving the equitable tenants for life."

In *Bigelow* v. *Clap,* 166 Mass. 88, a testamentary trust gave a life estate to the daughter, and at her death a remainder over to nieces and nephews "who may then be living." Until the death of the daughter "the persons who were to take were then to be ascertained, and they could not be ascertained before." It was held that only a contingent interest was given to the nieces and nephews.

In *Carr* v. *N.E. Anti-Vivisection Soc.,* 234 Mass. 217, a trust for the benefit of a wife for life and at her death "to my heirs at law then living" was held to indicate an

intention that the remainder was to vest at the time of his wife's death in his then heirs at law; or, as was expressed by the said trust, in his heirs at law who were "then living."

In *Crapo* v. *Price,* 190 Mass. 317, a certain sum was left in trust to pay the income to Keziah Price during her life and the gift over directed the trustee "to pay, distribute and divide the said principal fund, however the same may be then invested, to and among the children of said Keziah and the issue of any deceased child by right of representation, such issue taking the share which would have belonged to their deceased parent." The directions to the trustees to divide the fund among those who could not be ascertained until after the termination of the life estate indicated that the remaindermen must be determined at that time or that all the remainders were contingent. The court further pointed out that there were no words of present gift to the children of the life tenant. "The trustees are directed to pay to Keziah Price the income during her life, and after her decease to pay and divide the principal fund to and among her children and the issue of any deceased child. The employment of such language often has been held to indicate that the testator intended that the title should not vest until the period of distribution should arrive, that the bequest should be contingent until that time." It was accordingly held that the interests of all the remaindermen were contingent and that no title vested until after the death of the life tenant.

Eager v. *Whitney,* 163 Mass. 463.
White v. *Underwood,* 215 Mass. 299.

The Supreme Judicial Court of Massachusetts held that the indenture of trust did not grant a vested interest in the children during the life of their mother. "The case at bar seems to us distinguishable from *Coolidge* v. *Long.* By the instant trust instrument the income was to be paid to

the intestate during her life, and after her death the net income was to be paid by quarter-yearly payments to such of her children 'as may be living at the time of payment, in equal shares,' with provision for payment to issue of any deceased child, 'until the expiration of twenty years next succeeding the death of' the intestate; 'and upon the expiration of the said twenty years' to transfer in absolute ownership the corpus of the trust "in equal shares to and among the children, then living' of the intestate. It is open to doubt whether this gift over could take effect as a remainder and whether its true nature is not an executory limitation. 1 Fearne on Contingent Remainders (10th ed.) 397, 398. *Simonds* v. *Simonds,* 199 Mass. 552. It is not necessary to discuss this point. It appears clear that at most the remainder was contingent and not vested until the death of the intestate. None of her children were born at the time the trust was established. Nothing then vested in them. The children of the intestate up to the moment of her death had no interest in the trust except, at best, 'a bare contingent remainder expectant upon her death and their surviving her.' *Wright* v. *Blakeslee,* 101 U.S. 174, 177. There are many decisions to the effect that trust instruments of a tenor similar to the one here in issue constitute contingent remainders, and until the event or date designated for the vesting arrives the persons to take cannot be ascertained and no estate vests in any one before the happening of that event. *Olney* v. *Hull,* 21 Pick. 311, 315. *Nash* v. *Nash,* 12 Allen, 345, 347. *Thomson* v. *Ludington,* 104 Mass. 193. *Springfield Safe Deposit & Trust Co.* v. *Ireland,* 268 Mass. 62, 66. Gray on Perpetuities (3d ed.) 86, and cases cited. The case at bar is governed by these decisions. The interest in this trust did not vest in the petitioners until the death of their mother in 1931. That was subsequent to the enactment of the tax law. Whatever interest then vested in them was subject to the tax'' (R. 28, 29).

The construction of this deed of trust was in accordance with the settled principles of law in force for years in Massachusetts, and, under that law, the Supreme Judicial Court has found the trust instrument, if it constituted anything more for the benefit of the children than an executory limitation, granted at most but a contingent remainder. The determination of the nature and effect of the interests passing under this trust was based by the State court upon the State law, and was consistent with the principles established and in force for years in that Commonwealth. The question was decided according to the common law of that State. It has been the uniform practice of the Supreme Court of the United States to accept the decision of the State court as to the law of that particular State.

De Vaughn v. *Hutchinson,* 165 U.S. 566.
Clarke v. *Clarke,* 178 U.S. 186.
Orr v. *Gilman,* 183 U.S. 278, 283.
East Central Eureka Min. Co. v. *Central Eureka Min. Co.,* 204 U.S. 266, 272.
Enterprise Irrigation Dist. v. *Canal Co.,* 243 U.S. 157, 166.
Nickel v. *Cole,* 256 U.S. 222, 226.

Where, as here, a contention is made that the imposition of a tax upon the devolution of property in accordance with a deed executed prior to the enactment of the taxing statute is contrary to the contract clause, Art. I, sec. 10, of the Constitution, then it is the rule of this court to construe the deed for itself in order to ascertain the rights therein granted to the parties, and then to determine if these rights have been impaired by the enforcement of the taxing statute.

Funkhouser v. *J. B. Preston Co.,* 290 U.S. 163, 167.

United States Mtg. Co. v. *Matthews,* 293 U.S. 232.
Violet Trapping Co. v. *Grace,* 297 U.S. 119.
Ingraham v. *Hanson,* 297 U.S. 378.

The construction of the State court is entitled to careful consideration and due weight and is to be affirmed unless it clearly appears that its interpretation was erroneous.

Board of Liquidation v. *Louisiana,* 179 U.S. 622.
Seton Hall College v. *South Orange,* 242 U.S. 100.
Nickel v. *Cole,* 256 U.S. 222.
Coombes v. *Getz,* 285 U.S. 434, 441.

The Massachusetts succession tax has always been interpreted in that State to apply in every case where "The privilege is not fully exercised until the property shall have come into the possession of the beneficiary."

Attorney General v. *Stone,* 209 Mass. 186, 190.
Minot v. *Treasurer & Receiver General,* 207 Mass. 588.
State Street Trust Co. v. *Treasurer & Receiver General,* 209 Mass. 373, 378.
Clarke v. *Treasurer & Receiver General,* 226 Mass. 301, 305.
Worcester County National Bank v. *Commissioner of Corporations & Taxation,* 275 Mass. 216, 220, 221.

A testatrix died before the enactment of a statute imposing an additional tax, which was made retroactive to a date prior to the date of her death. It was held that such additional tax was lawfully assessed because, although the title vested upon the death of the testatrix, yet the subse-

quently enacted statute was applicable because "The commodity known as succession, however, had not come to an end until after the statute became effective."

Magee v. *Commissioner of Corporations & Taxation,* 256 Mass. 512, 515, 516.

The State court, therefore, did not give any retrospective effect to the taxing statute, but found that an interest passed upon the death of the intestate in 1931, and applied the existing statute to the succession of this interest by the children.

The State Supreme Judicial Court decided that the interests passing to the children upon the death of their mother in 1931 came within the provisions of the taxing statute (G.L. c. 65, sec. 1, Appendix, *infra*) and were subject to the tax. The meaning and interpretation of this taxing statute were, in the first instance, matters for the determination of the State court, and the interpretation of a State statute by the highest court of a State will usually be adopted by the Supreme Court.

Smiley v. *Kansas,* 196 U.S. 447.
Supreme Lodge, K.P., v. *Meyer,* 265 U.S. 30.
Gregg Dyeing Co. v. *Query,* 286 U.S. 472.
Guaranty Trust Co. v. *Blodgett,* 287 U.S. 509, 513.
Great Northern R. Co. v. *Sunburst Oil & Ref. Co.,* 287 U.S. 358, 362.
Hicklin v. *Coney,* 290 U.S. 169, 172.
Hartford Acc. & Indemnity Co. v. *N. O. Nelson Mfg. Co.,* 291 U.S. 352, 358.
Burns Mortgage Co. v. *Fried,* 292 U.S. 487.
Marine Nat. Exch. Bank v. *Kalt-Zimmers Mfg. Co.,* 293 U.S. 357, 363, 366.
Morehead v. *Tipaldo,*—U.S.—(decided June 1, 1936).

The Commonwealth of Massachusetts has a right to impose an excise upon the privilege of the children receiving property which passed to them on account of the death of their mother. They had no right to receive the property or the income therefrom and no control or supervision over the property while their mother lived. The title thereto was vested in the trustees. Full title, free and unencumbered, did not vest in the children until the death of their mother. Until that moment arrived, the succession was not complete. The benefits which they then received were of a more tangible nature than those received by the surviving tenant by the entirety or the surviving joint tenant—cases in which a Federal transfer tax was held to have been lawfully imposed even if the deeds creating the tenancy were executed long before the enactment of the taxing statute.

Tyler v. *United States,* 281 U.S. 497, 503.
Klein v. *United States,* 283 U.S. 231.
Phillips v. *Dime Trust & Safe Dep. Co.,* 284 U.S. 160.
Gwinn v. *Commissioner of Internal Revenue,* 287 U.S. 224 .

The appellants claim that under the case of *Coolidge* v. *Long,* 282 U.S. 582, the State had no authority to tax the interests passing under the 1877 trust of their mother. This case, however, held that, all the rights of the children having been fully vested upon the creation of a trust which was made long before the enactment of the taxing statute, no succession tax could be laid by the State. The Commissioner, however, contends that the interests of the children were not fully vested until the death of their mother in 1931, when a taxing statute was then in force. If the children did not secure any additional rights in the property by the death of their mother, then, of course,

there was no occasion for the laying of a succession tax. *Coolidge* v. *Long,* however, does not decide that such a tax cannot be imposed in a case where definite accessions to the property are secured by the children upon the death of the settlor, even though such succession to property is provided for in an instrument executed prior to the enactment of the taxing statute. If, therefore, the title to the trust property vested in the children for the first time immediately following the death of their mother, so that her death could rightly be said to be the generating source, resulting in the vesting of economic benefits to the children, then a tax was validly imposed by the Commonwealth of Massachusetts, even though the trust was created prior to the passage of the taxing statute. That was the basis upon which the State Supreme Court determined that the tax was a lawful one, and, if this construction of the trust instrument by the State court was correct, of course there was no impairment of any contract rights, because no vested interests of the children were interfered with and because the State had a right to impose a tax upon property passing while the taxing statute was in force.

Klein v. *United States,* 283 U.S. 231.
Gwinn v. *Commissioner of Internal Revenue,* 287 U.S. 224.

The imposition of a tax under such circumstances is not forbidden by the decision in *Coolidge* v. *Long.* It does not result in an attempt by the State court to apply a taxing statute retroactively.

Reinecke v. *Northern Trust Co.,* 278 U.S. 339.
Guaranty Trust Co. v. *Blodgett,* 287 U.S. 509, 513.
Phillips v. *Dime Trust & Safe Dep. Co.,* 284 U.S. 160, 166.
Griswold v. *Helvering,* 290 U.S. 56, 58.

II.

The Interests Passing under the Trust of 1862 were Taxable.

Amos A. Lawrence in 1862 created a trust for the benefit of the intestate by depositing a sum with the Massachusetts Hospital Life Insurance Company, which agreed to pay the income to the intestate during her life and at her death to such persons as she may by will appoint and in default of any such appointment to her surviving children (see Exhibit "C," R. 19). The intestate never exercised this power of appointment, and accordingly, upon her death in 1931, her four children became entitled to receive this trust property.

The Massachusetts statute, G.L. c. 65, sec. 2 (Appendix, *infra*), expressly provided that "whenever any person shall exercise a power of appointment, . . . and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under section one shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure." Whether the children or any of them should ever take this trust fund, or, if so, the proportion in which any or all of them should share, was entirely dependent upon whether or not the intestate exercised or omitted to exercise this general power of appointment. She had this right up to the moment of her death, and, no appointment then having been made, that event was the generating source by which economic benefits in this trust property were shifted to

the children. Under such circumstances, the passing of these interests to the children in 1931 was subject to the said Massachusetts succession tax.

Bullen v. *Wisconsin*, 240 U.S. 625.
Chase National Bank v. *United States*, 278 U.S. 327, 335, 336.
Reinecke v. *Smith*, 289 U.S. 172, 174, 175.

That the interests passing to the children under this particular statutory provision were subject to the tax in question was definitely settled in *Saltonstall* v. *Saltonstall*, 276 U.S. 260, 269, 270.

The validity of this statute imposing a tax in default of the exercise of a power of appointment has recently been upheld again by the State court in *Boston Safe Deposit & Trust Co.* v. *Commissioner of Corporations & Taxation*, 1936 Massachusetts Advance Sheets, 1411, 3 N.E. (2d) 33.

III.

The Interests Passing under the Trust of Sarah E. Lawrence were Taxable.

The will of Sarah E. Lawrence, the mother of the intestate, provided "that any one of my said six children may by his or her will, appoint the shares in which that part of the net income which is hereinbefore given to his or her children . . . shall be apportioned . . . and also the proportions in which that part of the trust property and fund which is hereinbefore given, in such final distribution . . . shall be divided among such children and issue" (R. 11). Mrs. Lawrence died in 1891 (R. 18).

The intestate, however, never exercised this power of appointment, and until the death of the latter the interests that the children would take therein could not be ascer-

tained. That depended entirely upon whether or not their mother exercised or failed to exercise this power of appointment. Their equal interests in the income resulted from the omission of the intestate to exercise the control which she had in determining how the income should be divided among her children. She had that control up to her death in 1931. Her failure to use this power of appointment resulted in the passing of this property upon her death, and by reason of her death, in equal shares to her children. The succession to these children, therefore, became completed in 1931.

The Supreme Judicial Court held that "This gift of income to the children of the intestate was contingent in a double aspect. In order to take, such child must survive the intestate and also be living at the time of payment. So, also, as to sharing in the principal; grandchildren who decease before the time set for the termination of the trust are excluded and, until that time arrives, the persons to be benefited cannot be ascertained. Apart from these contingencies, the interests of the children of the intestate did not vest upon the death of Sarah E. Lawrence in 1891, because the intestate was given power of appointment of the shares of income among her children. Until her death, the right to this interest vested in no one" (R. 29, 30).

The appellants, however, claim that the intestate only had a special power of appointment, the exercise of which was limited in favor of her children, and that, therefore, the failure to exercise such a limited power did not subject the recipients of the property to a succession tax. The State court held that this privilege of succession was taxable under a previous Massachusetts decision. "The case at bar on this point is governed by *Burnham* v. *Treasurer & Receiver General,* 212 Mass. 165. The failure of the intestate to exercise the power of appointment is indicative of approval of equal division. There appears to be no

reason to overrule this controlling authority. It has not been shaken or weakened by any subsequent decisions. We are unable to perceive that it is incompatible with any provisions of the Constitution of the United States" (R. 30).

The Massachusetts succession tax has been held to be payable out of the property appointed by the donee exercising a special and limited power of appointment.

Loring v. *Gardner*, 221 Mass. 571.

A further answer to this contention is that the passing of all property coming within the sweep of the statute is taxable. The words of the statute are broad and comprehensive and impose a tax "Whenever any person shall exercise a power of appointment . . . and whenever any person possessing such a power of appointment . . . shall omit or fail to exercise the same" (G.L. c. 65, sec. 2, see Appendix, *infra*). The statute includes a special testamentary power of appointment. Concerning the scope of this particular section, it has been said by the Supreme Judicial Court of Massachusetts that "Their words make plain the legislative purpose to impose the excise on whatever rightly may be termed a 'succession' coming within the specific statutory description. 'Succession,' as that word is used in the statute, has been said in numerous decisions to include the privilege enjoyed by the beneficiary of succeeding to the possession and enjoyment of property."

Saltonstall v. *Treasurer & Receiver General*, 256 Mass. 519, 523.

The object and aim of the statute, the nature of its subject, and its apt and broad phraseology negative any intent to exclude therefrom a special or limited power of appointment.

The conclusion of the State court that G.L. c. 65, sec. 2 (Appendix, *infra*), laying an excise upon the privilege of succeeding to property either by the exercise of a power of appointment or on account of the failure to exercise such a power, not only embraces a general power of appointment, but includes a limited or special power, cannot be said to present a Federal question, because the interpretation and construction of this statute by the State court was "controlling as to the meaning and extent of the statutory requirements."

Hicklin v. *Coney,* 290 U.S. 169, 172.
Castillo v. *McConnico,* 168 U.S. 674, 683.
Milwaukee Elec. Ry. v. *Wisconsin R.R. Comm.,* 238 U.S. 174.
Nickel v. *Cole,* 256 U.S. 222.
Supreme Lodge, K.P., v. *Meyer,* 265 U.S. 30, 33.
Stebbins v. *Riley,* 268 U.S. 137.
Hartford Acc. & Indemnity Co. v. *Nelson Co.,* 291 U.S. 352, 358.

Up to the moment of her death, the intestate, by virtue of the power of appointment, had such control and command over the appointed property that she could determine in what proportion it should be given to her children. She also had the absolute right to exercise this power and permit the property to go in equal shares to each of her children. That right over the appointed property did not cease until her death. The salient facts in the case at bar are substantially similar to those in *Saltonstall* v. *Saltonstall,* 276 U.S. 260, and the statute imposing the tax in both cases is the same identical statute. Under such circumstances the case cited is decisive of the case at bar.

Bullen v. *Wisconsin,* 240 U.S. 625.

Chase Nat. Bank v. *United States*, 278 U.S. 327, 335, 336.
Reinecke v. *Smith*, 289 U.S. 172, 174, 175.

IV.

All the Interests Passing by the Death of the Mother could be Joined for the Purpose of Determining the Amount of the Tax.

The appellants contend that the interests passing to the children under the trust of 1862 and those passing under the will of Sarah E. Lawrence could not be joined with each other or with the interests passing from the individual estate of their mother.

The death of the mother effected a completion of succession. The passing of the interests from the mother's estate and from the various trusts was motivated by the same event, and they passed simultaneously upon the happening of this identical event. The validity of the tax is not challenged in so far as the individual estate of the mother is concerned. The trust created in 1877 was made by the intestate herself and was apparently composed entirely of her own property. She was the source of succession of this trust property to her children to the same extent as she was the source of the succession of the property of her own individual estate which passed to them by intestate succession. The interests in both passed at the same time, from the same owner and upon her death.

Under the trust of 1862 and under the trust set forth in the will of Sarah E. Lawrence, the intestate was the donee of a power of appointment. Her failure to exercise the powers conferred resulted at her death in the devolution of the property to her children. In such instances the

statute considers the succession as originating with the donee. For taxing purposes the donee was virtually regarded as if she were the owner. It is true that in Massachusetts the appointee does not take from the donee of the power (*Sewall* v. *Wilmer,* 132 Mass. 131; *Emmons* v. *Shaw,* 171 Mass. 410), but it is equally true that the donee, by the exercise of the power, has such a proprietary interest in the appointed property that it can be reached by creditors of the donee and applied in satisfaction of his indebtedness, as it "commonly has been said that property so appointed should be deemed or considered or treated in equity a part of the assets of the estate of the donee of the power so far as necessary to pay his creditors' claims which otherwise would go unsatisfied."

Shattuck v. *Burrage,* 229 Mass. 448, 452.

The validity of this provision of the Massachusetts statute taxing the property to the donee first came before the State court in *Minot* v. *Treasurer & Receiver General,* 207 Mass. 588, which upheld this statute. "The condition of property which is subject to a general power of appointment contained in a will or deed, and which, in default of appointment, is to be given over to persons named, is peculiar. The donee of the power has no title to it, but he has an absolute right to dispose of it by the exercise of the power. If the power is to dispose of it by an instrument in the nature of a will signed by three witnesses, as was the fact in this case, if he exercises the power the property becomes a part of his estate for administration after his death, and may be used for the payment of his debts. His relation to it is very much like that of an owner. *Clapp* v. *Ingraham,* 126 Mass. 200. *Olney* v. *Balch,* 154 Mass. 318. Those who would take, in default of an appointment, have only an interest which is contingent upon

the conduct of the donee of the power, who can make it vest in them absolutely in possession, or can defeat it altogether. He can make it vest in possession by an appointment to the persons named as the takers in default of appointment, in which case it will be theirs, subject only to a possible use for the payment of his debts, or he can do it by an omission to exercise the power, or he can dispose of it by an appointment to others, thus terminating the contingent interest and leaving the contingent remaindermen nothing. After a will or deed containing such a power has taken effect and before the donee of the power has acted under it, have all rights of succession in possession and enjoyment so vested that there is no possibility of a succession that will come into existence later, when the final disposition of the property is determined by an exercise of the power or by a failure to exercise it? It is held, and so far as we know without dissent, that, through the exercise of the power, a right of succession to property may come into existence afterwards, which properly may be a subject for the imposition of a tax" (p. 591.) "The statute treats the result as depending upon the conduct of the donee, who may appoint or refrain from appointing. If he appoints, the succession under the statute is to be treated as determined by him, and the right thus acquired by the appointee is treated as taxable, because received as a benefit under our law. Can there be any doubt of the power of the Legislature so to treat the coming of the appointee into the succession? It seems not. To this extent the cited cases seem to go" (p. 592).

"It is but a short step further to apply the second part of the statute, which refers to coming into succession through the conduct of the donee in refusing or omitting to make an appointment that might carry the succession elsewhere. While he has the power of appointment, he is in control of the succession."

"The test to be applied to determine whether property passing by the exercise of a power of appointment is or is not subject to an inheritance tax under St. 1909, c. 527, § 8 [now G.L. c. 65, § 2], is this: Would the property in question have been subject to an inheritance tax if it had been the property of the donee of the power and had passed by way of devise or legacy under his will?"

Clark v. *Treasurer & Receiver General,* 218 Mass. 292, 293.
Loring v. *Gardner,* 221 Mass. 571.

The validity of State statutes permitting the imposition of a tax as if the donee of the power were the owner of the property has been settled in this court.

A father died prior to the enactment of a transfer tax leaving a will giving his son a power of appointment which the son exercised after such a law was passed. It is important to note in passing that the will gave the son a limited power of appointment which he could only exercise in favor of his children or the issue of such children. This power of appointment was almost as restricted as the one in the case at bar. The statute imposed a tax upon the estate of the donee as if the appointed property was owned absolutely by him. "The Court of Appeals held that it was the execution of the power of appointment which subjected grantees under it to the transfer tax. This conclusion is binding upon this court in so far as it involves a construction of the will and of the statute. Nor are we able to perceive that thereby the plaintiffs in error were deprived of any rights under the Federal Constitution. The rule of law laid down by the New York courts is applicable to all alike, and even if the view of the Court of Appeals respecting the question was wrong, it was an error which we have no power to review."

Orr v. *Gilman,* 183 U.S. 278, 288.

The estate of the donee who exercised the power of appointment, which was limited to a special class, conferred by a deed executed many years prior to the passage of a transfer tax, was subject to the taxing statute which was in force when the donee died. The attempt to avoid the tax by the claim that the property came from the donor and not from the donee was unsuccessful, as the State had the sovereign right to impose a tax upon the exercise of a testamentary power.

Chanler v. *Kelsey,* 205 U.S. 466.

The present statute, imposing a tax upon the donee "in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power" and further providing that the omission or failure to exercise such a power shall be deemed to be "a disposition of property taxable . . . to the extent of such omission or failure," was held valid in *Saltonstall* v. *Saltonstall,* 276 U.S. 260.

The source of all the property in the 1877 trust apparently included only property belonging to the intestate, and the title, use and enjoyment of this trust property passed to the children at the same time and in the same way as did the individual property of the intestate estate of their mother. In both the Amos A. Lawrence trust of 1862 and the Sarah E. Lawrence will of 1891 the intestate had a power of appointment which she did not exercise, and the rights of the children were determined by the failure to exercise this right by their mother. The Commonwealth of Massachusetts joined these four interests because, in the first two cases, it was property belonging to the mother and which came to the children on account of her death, and in the last two because, under the statute, the property covered by the power of appointment was considered as

that of the mother. The aggregate amount passing to the children was the direct result of the total benefits received by each. This, the State court has declared, is the proper basis upon which the computation of the tax is authorized by the State statutes.

The Massachusetts succession tax prescribed a graduated rate measured by the value of the property. Combining the three trusts with the intestate property of the mother required the children to pay a greater tax than if each of the three trusts and the intestate property were treated separately.

In the case at bar the Supreme Judicial Court held that "There was no error in uniting the several interests passing to the petitioners on the death of the intestate for the purpose of determining the tax under the last paragraph of G.L. (Ter. Ed.) c. 65, § 1, already quoted. Manifestly the interests passing under the 1877 trust established by the intestate were properly united with those passing from her by intestate succession. *Marble* v. *Treasurer & Receiver General,* 245 Mass. 504. *Pratt* v. *Dean,* 246 Mass. 300. The interests established by the Amos A. Lawrence trust of 1862 and those created by the will of Sarah E. Lawrence may likewise be so united. It is expressly provided by G.L. (Ter. Ed.) c. 65, sec. 2, that, whenever property passes by omission or failure of the donee of a power to exercise a power of appointment, 'a disposition of property taxable under section one shall be deemed to take place . . . as though the persons thereby becoming entitled . . . had succeeded thereto by a will of the donee of the power. . . .' Those words are thus imported into § 1 of said c. 65 and the property is taxable according to its terms. It follows that these interests by virtue of these sections are taxable as property of the intestate passing upon her death. See *Ames* v. *Commissioner of Corporations & Taxation,* 269 Mass. 352" (R. 30, 31).

The conclusion by the State court that the statute permitted the joining of the interests which the children received simultaneously at the death of their mother and also on account of her death and from the three trusts and from their mother's estate does not present a Federal question. The construction by the highest State court of a State statute is binding upon the Federal courts.

Supreme Lodge, K.P., v. *Meyer*, 265 U.S. 30, 32.
Jones v. *Prairie Oil & Gas Co.*, 273 U.S. 195, 200.
Burns Mtg. Co. v. *Fried*, 292 U.S. 487.
Graham v. *White-Phillips Co.*, 296 U.S. 27.
Borax Consolidated, Ltd., v. *Los Angeles*, 296 U.S. 10.
Morehead v. *Tipaldo*,'—U.S.—(decided June 1, 1936).

The appellants further contend that, by joining these various interests, a tax is imposed upon one person for the property of another.

Hoeper v. *Tax Commission*, 284 U.S. 206.

The tax in question, however, was not a property tax, but an excise tax laid upon the privilege of receiving property. Although the tax was in the first place paid by the administrators or the trustees, it was ultimately payable by the beneficiaries. They were only charged for the privilege of succeeding to property none of which vested in them until the death of their mother. The obligation of the tax was laid upon the succession and measured by the statutory rate for the aggregate value of the property passing to the beneficiaries. They were simply required to pay for the privilege of being permitted to take. "The Massachusetts statute by plain words places the real burden of the tax upon the legatee or other person who receives a decedent's property. Pay-

ments required of an executor are only preliminary; ultimately they must be met by the beneficiaries. Decisions of the Massachusetts Supreme Court show with adequate certainty that the right of succession is the real object of the charge laid because of property which passes by will or under the laws relative to intestacy. The thing burdened is the right to receive."

Leach v. *Nichols,* 285 U.S. 165, 169.

The excise is laid on the privilege of the beneficiaries to receive the property. It is measured by the benefit accrued. The children have benefited by receiving property from each of three trusts and from their mother's estate. The total benefit was made the standard upon which the tax was computed. It is the same tax in the same amount that would be assessed upon every one who received the same total value of property. The children should pay at the prescribed rate for the benefit which they are permitted by the State to secure and enjoy. There should be no evasion of taxes by segregating the total amount received into four parts. The case at bar is distinguishable from *Hoeper* v. *Tax Commission,* 284 U.S. 206, because, in the first place the tax in the case cited was a property tax, while in the case at bar the tax is an excise. The tax in the case cited was in part based upon property in which the taxpayer had no interest, while in the present case the tax is computed upon the amount of property received, and is ultimately payable only by those who have received this benefit. The tax is a charge upon the privilege of succession. It is laid on no one other than those who have participated in such a privilege, and its amount is only commensurate to the value of the privilege conferred. The beneficiaries are not charged on account of the property owned by another or on account of a privilege enjoyed by

another. The benefit is entirely theirs and so should be the burden, including that of taxation.

The statute (G.L. c. 65, sec. 17, see Appendix, *infra*) directly places this burden upon the beneficiaries.

Burnet v. *Leininger*, 285 U.S. 136.
Porter v. *Commissioner of Internal Revenue*, 288 U.S. 436, 444.
Burnet v. *Wells*, 289 U.S. 670, 682.

The fact that at the time of her death the legal title of the corpus of each of these trusts was in the trustees was immaterial. The children were taxed because they had become recipients of the property.

Reinecke v. *Smith*, 289 U.S. 172, 177, 178.

V.

The Taxing Statute is Not Unreasonable or Arbitrary.

The appellants further contend that the statute (G.L. c. 65, sec. 2, Appendix, *infra*) is invalid because it only applies to such written instruments creating a power of appointment as were executed prior to September 1, 1907. It is true that this statute expressly provides that, "whenever any person shall exercise a power of appointment, derived from any disposition of property made prior to September first, nineteen hundred and seven . . . and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor," then in either case the property passing is taxable. The date mentioned is the date upon which the Massachusetts tax first became effective upon direct descendants (Massachusetts Acts of 1907, c. 563).

Property passing by any instruments executed since September 1, 1907, would, of course, be subject to the suc-

cession tax then in force. Property which has been transferred prior to September 1, 1907, would not be amenable to the subject statute. The Legislature, however, sought to reach a large class where the succession would take place after the enactment of the taxing statute by virtue of a provision in a written instrument executed before the date of the passage of such a statute. The statute brought within its sweep property whose devolution depended upon the exercise or the failure to exercise a power of appointment, and so where the beneficiary could not finally be determined until the death of the donee, which occurred after the effective date of the statute. It was early decided in Massachusetts that the contention that such a statute, imposing a tax only in cases where the deed, trust or contract was made before September 1, 1907, was invalid was untenable. "Nor is it unconstitutional because it applied only to cases in which a succession tax remained unpaid. This is governed in principle by *Minot* v. *Treasurer & Receiver General,* 207 Mass. 588, in which a statute applying only to powers of appointment 'derived from any disposition of property made prior to September first, nineteen hundred and seven,' was held to be constitutional."

Attorney General v. *Stone,* 209 Mass. 186, 191.

Property passing in accordance with an indenture executed subsequent to the enactment of the taxing statute would be subject to the succession tax. Therefore the taxing statute is uniform and applies to all interests passing since the adoption of the statute on September 1, 1907. Such a taxing system covers the entire field and attaches to every succession occurring subsequently to its enactment.

In the case at bar the point was disposed of by the State court in these words: "The provisions of G.L. (Ter. Ed.) c. 65, § 2, are not violative of the constitutional guaranty of equal protection of the laws. They apply only to the exercise

of powers of appointment derived from any disposition of property made prior to September 1, 1907. This constitutional guaranty does not prevent reasonable classification nor condemn differences resulting from such classification. Tax laws must become operative on some date. The date named was when St. 1907, c. 563, became effective by which the tax was made applicable to direct as well as to collateral inheritances. The legislative intent possibly was to tax succession under St. 1907, c. 563, not as from the donee but from the donor of the power. Whatever the reason, the classification cannot be pronounced arbitrary or unreasonable. The tax operates equally and uniformly as to all within this class. It may fairly have been deemed by the General Court to be founded in the 'purposes and policy of taxation.' *Watson* v. *State Comptroller,* 254 U.S. 122, 125. *Maxwell* v. *Bugbee,* 250 U.S. 525, 543. *Stebbins* v. *Riley,* 268 U.S. 137, 142. *Louisville Gas & Electric Co.* v. *Coleman,* 277 U.S. 32, 37. *Hayes* v. *Missouri,* 120 U.S. 68, 71, 72. *Colgate* v. *Harvey,* 296 U.S. 404. The decision in *In re Estate of Pedersen,* 198 Iowa, 166, 172, 173, precisely supports the conclusion here reached" (R. 31).

It is true that chapter 65, sec. 2, applies only to property passing as a result of the exercise or the failure to exercise a power of appointment in any instrument created prior to September 1, 1907, the effective date of the enactment of the first statute (St. 1907, c. 563, now chapter 65, sec. 1) imposing a succession tax upon direct descendants. In the absence of such a statute, property passing by virtue of a power of appointment or in default of the exercise of such power as provided for in an instrument executed before September 1, 1907, would escape taxation although the succession did not occur until after the enactment of the taxing statute.

Emmons v. *Shaw,* 171 Mass. 410.

The Legislature had the right to lay a tax upon the basis that the property subject to the power should be considered as owned by the donee of the power.

Emmons v. *Shaw*, 171 Mass. 410, 412, 413.
Minot v. *Treasurer & Receiver General*, 207 Mass. 588.
Moffitt v. *Kelly*, 218 U.S. 400.

If the instrument creating the power was executed since September 1, 1907, then the devolution of the property comes within the sweep of chapter 65, sec. 1. The tax is in the first instance imposed upon the estate of the donor and the time and manner of payment of the tax is delayed until the succession is completed by the actual receipt of the property by the beneficiaries (chapter 65, sec. 7, *infra*).

Attorney General v. *Stone*, 209 Mass. 186.
New England Trust Co. v. *White*, 224 Mass. 332.
Moors v. *Treasurer & Receiver General*, 237 Mass. 254.

Those taking under an instrument dated prior to September 1, 1907, are treated equally upon the same basis and their tax is computed upon the value of the property received at the rate determined by their relationship with the donee. Those taking under instruments created subsequently to September 1, 1907, are also treated alike and their tax is uniformly computed upon the value of what they actually received at the rate fixed by their relationship to the donor. Every member in each class is accorded the same rights as any other member in that class. While the tax in the first instance is imposed upon the estate of the donee or the donor, depending upon whether the instrument was dated before or after September 1, 1907, nevertheless, the tax in every case is payable by the ulti-

mate beneficiary. Such a taxing statute, we submit, is valid.

Keeney v. *New York*, 222 U.S. 525, 535.

Conclusion.

The children received property passing from each of the three trusts and also from the estate of their mother. All of this property was received at one and the same time, and its receipt resulted from the death of the mother. The children did not have any rights of ownership in the corpus of the 1877 trust created by their mother until her death, and the property composing the Amos A. Lawrence trust and the Sarah E. Lawrence trust came to them on account of the failure of their mother to exercise the power of appointment given to her. The State had the right to aggregate these various interests and to compute and collect a succession tax.

We therefore respectfully submit that the decision of the Supreme Judicial Court of Massachusetts should be affirmed.

Respectfully submitted,

HENRY F. LONG, *Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts,*

By PAUL A. DEVER,
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Appendix.

Applicable Massachusetts Statutes.

The pertinent statutory provisions are contained in General Laws of Massachusetts (Tercentenary Edition), chapter 65, sections 1, 2 and 17.

"Section 1. All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the commonwealth, and all real estate or any interest therein and all tangible personal property within the commonwealth belonging to persons who are not inhabitants of the commonwealth except such an interest in such real estate as is represented by a mortgage or by a transferable certificate of participation or share of an association, partnership or trust, which shall pass by will, or by laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made in contemplation of the death of the grantor or donor or made or intended to take effect in possession or enjoyment after his death, and any beneficial interest therein which shall arise or accrue by survivorship in any form of joint ownership in which the decedent joint owner contributed during his life any part of the property held in such joint ownership or of the purchase price thereof, to any person, absolutely or in trust, except to or for the use of charitable, educational or religious societies or institutions, the property of which is by the laws of the commonwealth exempt from taxation, or for or upon trust for any charitable purposes to be carried out within the commonwealth, or to or for the use of the commonwealth or any town therein for public purposes, shall be subject to a tax at the percentage rates fixed by the following table:

Relationship of Beneficiary to Deceased.	Rate Per Centum of Tax on Value of Property or Interest.							
	On Value not over $10,000.	On Excess above $10,000, not over $25,000.	On Excess above $25,000, not over $50,000.	On Excess above $50,000, not over $250,000.	On Excess above $250,000, not over $500,000.	On Excess above $500,000, not over $750,000.	On Excess above $750,000, not over $1,000,000.	On Excess above $1,000,000.
Class A. Husband, wife, father, mother; child, adopted child, adoptive parent, grandchild, . . .	1%	1%	2%	4%	5%	5½%	6%	7%
Class B. Lineal ancestor, except father or mother; lineal descendant, except child or grandchild; lineal descendant of adopted child; lineal ancestor of adoptive parent; wife or widow of a son; husband of a daughter, . . .	1%	2%	4%	5%	6%	7%	8%	9%
Class C. Brother, sister, half brother, half sister, nephew, niece, step-child or step-parent, .	3%	5%	7%	8%	9%	10%	11%	12%
Class D. All others, . . .	5%	6%	7%	8%	9%	10%	11%	12%

"Provided, however, that no property or interest therein, which shall pass or accrue to or for the use of a person in Class A; except a grandchild of the deceased, unless its value exceeds ten thousand dollars, and no other property or interest therein, unless its value exceeds one thousand dollars, shall be subject to the tax imposed by this chapter, and no tax shall be exacted upon any property or interest so passing or accruing which shall reduce the value of such property or interest below said amounts.

"All property and interests therein which shall pass from a decedent to the same beneficiary by any one or more of the methods hereinbefore specified and all bene-

ficial interests which shall accrue in the manner hereinbefore provided to such beneficiary on account of the death of such decedent shall be united and treated as a single interest for the purpose of determining the tax hereunder.

"SECTION 2. Whenever any person shall exercise a power of appointment, derived from any disposition of property made prior to September first, nineteen hundred and seven, such appointment when made shall be deemed a disposition of property by the person exercising such power, taxable under section one, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will; and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under section one shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

. . . . . .

"SECTION 7. Taxes imposed by this chapter upon property or interests therein, passing by will or by laws regulating intestate succession, shall be payable to the commissioner by the executors, administrators or trustees at the expiration of one year from the date of the giving of bond by the executors, administrators or trustees first appointed; except that in all cases where there shall be a devise, descent or bequest to take effect in possession or come into actual enjoyment after the expiration of one or more life estates or of a term of years, the taxes thereon shall be

payable by the executors, administrators or trustees in office when such right of possession accrues, or, if there is no such executor, administrator or trustee, by the persons so entitled thereto, at the expiration of one year from the date when the right of possession accrues to the persons so entitled.

"If the probate court, acting under section thirteen of chapter one hundred and ninety-seven, has ordered the executor or administrator to retain funds to satisfy a claim of a creditor, the payment of the tax may be suspended by the court to await the disposition of such claim.

"Taxes imposed by this chapter upon property or interests therein, passing by deed, grant or gift to take effect in possession or enjoyment after the death of the grantor or donor, or upon beneficial interests arising or accruing by survivorship in any form of joint ownership, shall be payable by the grantee, donee or survivor at the expiration of one year from the date when his right of possession or enjoyment accrues. Taxes imposed by this chapter upon property or interests therein passing by deed, grant or gift made in contemplation of death shall be payable by the grantee or donee at the expiration of one year after the death of the grantor or donor.

"In case of any deed, grant or gift of a life interest or term of years, the donee for life or years shall pay a tax only on the value of his interest, and the donee of the future interest shall pay his tax when his right of possession or enjoyment accrues."

. . . . . .

"Section 17. An executor, administrator or trustee holding property subject to the tax imposed by this chapter shall deduct the tax therefrom or collect it from the legatee or person entitled to said property; and he shall not deliver property or a specific legacy subject to said tax until he has collected the tax thereon. An executor or ad-

ministrator shall collect taxes due upon land passing by inheritance or will which is subject to said tax from the heirs or devisees entitled thereto, and he may be authorized to sell said land, in the manner prescribed by section twenty-one, if they refuse or neglect to pay said tax."

SUPREME COURT OF THE UNITED STATES.

No 77.—October Term, 1936.

Harriet C. Binney, et al., Appellants,
vs.
Henry F. Long, Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts.

Appeal from the Probate Court, County of Norfolk, Commonwealth of Massachusetts.

[December 14, 1936.]

Mr. Justice Roberts delivered the opinion of the Court.

This appeal is from an order denying abatement of succession taxes assessed in respect of the estate of Hetty S. L. Cunningham, late a resident of Brookline, Massachusetts. Mrs. Cunningham died intestate in August 1931 leaving as her sole heirs four children, who, with the trustees and certain beneficiaries of three trusts wherein she had life estates, were the petitioners below and are the appellants here. She left a substantial estate of her own which descended to her four children. Their succession to this estate was taxed, the tax was paid, and its legality is not questioned. Pursuant to the terms of the three trusts, her four children succeeded, upon her death, to the ownership and possession of certain property whereof she had been life tenant with power of appointment of principal; and succeeded to the enjoyment as life beneficiaries of other property as to which she had preceded them as life tenant. The appellee held the succession to the trust property taxable, and added the value of the corpus of Mrs. Cunningham's own estate and that of the interests to which the appellants succeeded upon her death with the result that the trust interests took a higher rate. The taxes assessed upon the three trust interests were paid and a petition was filed in the probate court for abatement in the view that the exaction was forbidden by Article I, Section 10, and the Fourteenth Amendment of the federal Constitution. The probate court reserved the questions, the Supreme Judicial Court decided them adversely to appellants[1] and upon its rescript the petition was denied.

In 1877 Mrs. Cunningham (then Hetty Sullivan Lawrence) conveyed property in trust reserving a life estate in the income but no

[1] Mass. Adv. Sheets, 1936, p. 153; 199 N. E. 528.

power to revoke, alter or amend. The income was to be paid for twenty years after her death "to and among such of" her children as "may be living at the time of payment", living issue of a deceased child to take by right of representation. If, at her death, or at any time during the twenty years thereafter, no child or issue of hers should be living the trustees were to transfer the principal to the heirs of her father, if he were then dead; otherwise, to her own heirs. She married and had five children, one of whom, born in 1892, died in 1923, without issue. The others, born between 1885 and 1890, are appellants.

In 1862 Amos A. Lawrence, the intestate's father, paid a sum of money to an insurance company which agreed to pay the income to the intestate and, upon her death, to distribute the principal and any unpaid income, to such persons as she might, by will, appoint, and in default of appointment, to her surviving children.

Sarah E. Lawrence, the intestate's mother, died May 27, 1891. Her will bequeathed property in trust to pay the income to each of her six children, two of whom still survive, and to the issue, *per stirpes*, of any deceased child so long as any of her children should live. For twenty years after the death of the last survivor of her children the income was to be paid to her grandchildren and their issue, *per stirpes*, and, at the expiration of that period, the principal was to be divided between the grandchildren, *per capita*, descendants of a deceased grandchild to divide his or her share *per stirpes*. Each child of Sarah E. Lawrence was empowered to "appoint the shares in which" the income given to his or her children and issue "shall be apportioned among such children and issue" and further to appoint the proportions in which the principal "shall be divided among such children and issue." Under this provision the four children of Mrs. Cunningham, who are appellants, succeeded to equal life estates in their mother's share, she having failed to exercise her power.

When the trusts were created Massachusetts imposed no inheritance or succession tax. The first statute imposing such a tax [2] applied only to collateral inheritance and excluded devolution to lineal descendants. In 1907 a law was enacted taxing testamentary devolution of property to lineal descendants;[3] this made no mention

[2] Acts 1891, c. 425.
[3] Acts 1907, c. 583, effective Sept. 1, 1907.

of powers of appointment; the tax was graduated according to amounts and relationships, but there was no requirement of aggregation of various interests passing and accruing to a single beneficiary from or on account of the death of a decedent to ascertain the rate of tax. Such a provision for uniting interests was enacted in 1924,[4] and incorporated with the first section of the act of 1907 as amended into a single section.[5]

The act of 1907 and its amendments were prospective in operation and exempted estates of those who had died prior to its effective date.[6] This exemption has extended to all interests which passed or accrued upon the death of Sarah E. Lawrence, the intestate's mother.

In 1909 provision was made for a succession tax upon the occasion of the exercise of, or nonexercise of, powers of appointment.[7] This, in its present form, is section 2 of chapter 65 of the general laws.[8] The effective date of this provision was declared to be September 1, 1907, which was the effective date of the 1907 act, and was twenty-one months prior to the effective date of the 1909 act in which the provision is embodied. It is conceded that there are no other statutes purporting to tax succession under nontestamentary gifts.

The acts are compiled in the general laws of the Commonwealth, and, so far as material to the present controversy, are:

General Laws (Ter. Ed.) c. 65:

"Section 1. All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the commonwealth . . . . which shall pass by will, or by laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made in contemplation of the death of the grantor or donor or made or intended to take effect in possession or enjoyment after his death . . . to any person, absolutely or in trust . . . shall be subject to a tax at the percentage rates fixed by the following table . . .

[A table of graduated rates here appears.]

"Provided, however, that no property or interest therein, which shall pass or accrue to or for the use of a person in Class A, except

[4] Acts 1924, c. 128.
[5] General Laws (Ter. Ed.) c. 65, § 1.
[6] General Laws (Ter. Ed.) c. 65, § 36.
[7] Acts of 1909, c. 527, § 8.
[8] General Laws (Ter. Ed.) c. 65, § 2.

a grandchild of the deceased, unless its value exceeds ten thousand dollars, and no other property or interest therein, unless its value exceeds one thousand dollars, shall be subject to the tax imposed by this chapter, and no tax shall be exacted upon any property or interest so passing or accruing which shall reduce the value of such property or interest below said amounts.

"All property and interests therein which shall pass from a decedent to the same beneficiary by any one or more of the methods hereinbefore specified and all beneficial interests which shall accrue in the manner hereinbefore provided to such beneficiary on account of the death of such decedent shall be united and treated as a single interest for the purpose of determining the tax hereunder.

"Section 2. Whenever any person shall exercise a power of appointment, derived from any disposition of property made prior to September first, nineteen hundred and seven, such appointment when made shall be deemed a disposition of property by the person exercising such power, taxable under section one, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will; and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under section one shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

. . . . . .

"Section 36. This chapter shall apply only to property or interests therein passing or accruing upon the death of persons dying on or after May fourth, nineteen hundred and twenty, and as to all property and interests therein passing or accruing upon the death of persons who have died prior to said date the laws theretofore applicable shall remain in force; but so much of this chapter as relates to property or interests therein passing by deed, grant or gift completed inter vivos in contemplation of death shall apply only to such deeds, grants or gifts made on or after May twenty-seventh, nineteen hundred and twenty."

THE 1877 TRUST.

The trust created by the intestate in 1877, by deed *inter vivos*, reserved no power of revocation or alteration and, in this respect, differed from that under consideration in *Saltonstall* v. *Saltonstall*, 276 U. S. 260. The appellants insist that the invalidity of Sec-

tion 1, *supra,* as applied to their succession is established by *Coolidge* v. *Long,* 282 U. S. 582, since to tax them would under the doctrine of that case impair the obligation of the intestate's contract, and deprive them of property without due process. The court below thought that case not controlling because there the remainders were vested from the date of the gift, whereas here the interests of appellants were executory or, at the best, contingent remainders which never vested until the intestate's death. In *Coolidge* v. *Long* this court concluded that the tax laid by the act of 1907 offended the contract and due process clauses of the federal Constitution because the interests of the remaindermen had vested at the date of the creation of the trust many years prior to the passage of the taxing act. It was held that the mere taking possession of that which had been vested in the beneficiaries for many years did not amount to a taxable occasion and constitutionally could not be so designated by the Commonwealth in view of the complete vesting of the beneficiaries' estates in remainder at the date of the execution of the deed.

The Supreme Judicial Court, following an unbroken line of authority in Massachusetts, and in accordance with the common law[9] and the law as declared by this court[10] holds that the appellants' estates, under the trust instrument of 1877, were, at most, contingent remainders which did not vest until after the intestate's death, and hence the transfers to them fell clearly within the statutory definition as made to take effect in possession or enjoyment after the donor's death. The appellants urge that, in imposing a succession tax, the state should disregard technical rules relating to the vesting of interests and look to the substance and they insist that for many years prior to 1907 those who were to take in succession to the intestate were ascertained, subject only to the contingency that, as in *Coolidge* v. *Long,* some of them might fall out of the class by death. The contention was made and rejected in *Coolidge* v. *Long.* The fact that the remainders were vested from the date of the deed, and the interests of those who took in remainder were merely subject to be defeated by a condition subsequent, was the basis for the conclusion that the tax could not constitutionally be laid upon the

[9] 1 Fearne, Contingent Remainders, (10 Ed.) 397, 398; Gray, Perpetuities (3 Ed.) 86.

[10] *Wright* v. *Blakeslee,* 101 U. S. 174, 177.

occasion of their acquiring physical possession of what had, in the eye of the law, long been their property. Having relied on legal rather than practical considerations to invalidate the tax in *Coolidge* v. *Long* it would be inconsistent here to rely on practical rather than legal considerations to invalidate the same tax. The Commonwealth was not prevented by the constitutional provisions which the appellants invoke from taxing the succession under the 1877 trust upon the occasion of the intestate's death since the appellants' estates never vested until that event.

As Mrs. Cunningham's death was the occasion for a tax upon the succession of those who take in remainder after her life estate we can conceive of no constitutional objection to the statutory provisions for uniting the interest thus derived with that which the appellants acquired in Mrs. Cunningham's own property at her death, and calculating the rate on the total according to a sliding scale.

THE 1862 TRUST.

The act of 1907, (Sec. 1, *supra*) does not purport to tax complete and irrevocable transfers *inter vivos,* not in contemplation of the donor's death, made subsequent to the effective date of the act. The 1862 contract was not made in contemplation of the grantor's death; it became effective when executed. Such a transfer made to-day would result in no tax upon the interest acquired by the life tenant or upon those interests resulting from her exercise or non-exercise of her power of appointment. By the act of 1909, however, (Sec. 2, *supra*) the legislature, while not attempting to tax the interests of the appellants as derived in succession to Amos A. Lawrence, does essay to tax those interests as derived from the intestate as the holder of a power of appointment under Amos A. Lawrence's contract. But the statutes do not tax similar interests the enjoyment of which depends upon the exercise or nonexercise of a power embodied in a deed effective after September 1, 1907. The law, therefore, creates two classes,—the one composed of beneficiaries who take at the death of the donee of a power created by an instrument antedating 1907, who are taxed,—and the other of beneficiaries who take in succession to the donee of a power conferred by a deed executed subsequent to 1907, who are not taxed. Upon its face the statute arbitrarily selects a past date, taxing the beneficiaries of an act if done prior to, and leaving untaxed

beneficiaries of a precisely similar act if done subsequent to that date. In justification of the discrimination the court below suggests that any change in the state's policy of taxation must take effect at some point of time. The truth of this statement is obvious but the appellants' complaint is not directed at the fact that inheritances occurring prior to the effective date of the act of 1907 have escaped taxation while those happening thereafter are subjected to the exaction. The claim that the statutes deny equal protection is based upon quite another sort of discrimination. Succession consequent upon testamentary gifts (that is those made by will, or in contemplation of death or to take effect in possession or enjoyment after death) made or to take effect after the date of the act is the subject of the excise. The succession to non-testamentary gifts made subsequent to the effective date of the act of 1907 is not taxed whether the person coming into ownership and enjoyment of property does so by virtue of the direct gift of the former owner or by virtue of the exercise or non-exercise of a power of appointment vested by the former owner in a third party. Thus the future policy of the Commonwealth is declared to be that those who benefit by a testamentary gift are to be taxed while those who benefit, either immediately or remotely, from a complete and irrevocable gift *inter vivos* are not to be taxed. On the other hand, the statutes declare that one who benefits remotely through the exercise or non-exercise of a power under an absolute gift long since completed is to bear the burden of the exaction. This is not the declaration of a new policy effective after the promulgation of the legislation. On the contrary the statutes declare the policy to be the exemption for the future of a well-known type of succession, while at the same time imposing a tax on the identical type if resulting from a past gift.

Neither the appellee nor the Supreme Judicial Court advances any satisfactory reason for this difference in treatment of persons similarly circumstanced.

The Supreme Judicial Court states:

"The legislative intent possibly was to tax succession under St. 1907, c. 563, not as from the donee but from the donor of the power. Whatever the reason, the classification cannot be pronounced arbitrary or unreasonable. The tax operates equally and uniformly as to all within this class. It may fairly have been deemed by the General Court to be founded in the 'purposes and policy of taxation.'"

Instead of assigning any reason for the discrimination the statement merely points out that two classes are created, those who are taxed and those who are not, and since all who are taxed are treated alike and all who are exempt are treated alike the statute is uniform in operation upon each class; and thus falls short of meeting the question for decision.

As we have noted the only basis for the classification is the time when the estate was created. This court has said that a tax on gifts *inter vivos,* so laid as to hit those made within a given period prior to the donor's death and exempting all others, would be wholly arbitrary. *Schlesinger* v. *Wisconsin,* 270 U. S. 230. And we have also said that a discrimination in the taxation of loans based solely upon the time when the loan was made would clearly be arbitrary and capricious. *Colgate* v. *Harvey,* 296 U. S. 404, 425.

It is said that prior to the passage of the act of 1909 succession derived through a power granted by an instrument effective before September 1, 1907, escaped taxation although the interest of the beneficiary really had its origin subsequent to that date; and thereby the Commonwealth unfairly lost taxes which were its due and discrimination resulted between beneficiaries under trusts created before and after September 1, 1907. The argument, however, overlooks the fact that a transfer through a power created after September 1, 1907, is, notwithstanding the act of 1909, still wholly untaxed where, as in the case of the trust under consideration, the power is to be exercised by a third party and the gift is not made in contemplation of the settlor's death. We fail to see how fairness, either to the Commonwealth or its citizens, is promoted by taxing the appellants, the beneficiaries of a trust made many years before the succession tax laws were adopted while exempting beneficiaries similarly situated in all respects save only that the trust was created after September 1, 1907. The discrimination becomes the more glaring when it is remembered that the tax is increased by the aggregation of the interest passing to the beneficiaries under the 1862 contract with that which they derive by inheritance from the intestate. Thus a beneficiary taking through a power under an *inter vivos* non-testamentary trust, created after September 1, 1907, would not have to aggregate the interest so derived with property inherited from the donee of the power, whereas one taking, as do the appellants, under a power in a deed executed in 1862 is compelled, by aggregation of the interests, to pay at a much higher rate on the property derived through the power.

In view of the hostile discrimination against a class of remaindermen arbitrarily singled out for taxation from all those similarly situated, we are bound to hold the statutes deny the equal protection of the laws in contravention of the Fourteenth Amendment.

THE 1891 TRUST.

In their operation upon the trust created in 1891 by the will of Sarah E. Lawrence the statutes discriminate between the appellants and others similarly situated. The discrimination differs in kind from that exhibited in the case of the 1862 trust but is equally hostile and arbitrary.

When Mrs. Lawrence died in 1891 the interests created in her lineal descendants were wholly exempt from taxation. When, in 1907, the Commonwealth adopted a policy of taxing succession by lineals the statute said nothing of powers of appointment. Nevertheless, under that act, had it been in force when Mrs. Lawrence died, the intestate, her daughter, would have paid a tax upon the value of the life estate given her by her mother's will and the appellants when they came into possession of remainder interests, upon the intestate's death, would likewise have been compelled to pay a tax upon their succession to Mrs. Lawrence's estate. The act of 1909 (Section 2, *supra*) recognizing that the act of 1907 (Section 1; *supra*) does not apply to the succession generated at the death of Mrs. Lawrence nevertheless pitches upon the fact that under her will the intestate had a power of appointment and makes the takers of Mrs. Lawrence's property in succession to the intestate liable for a tax as if the property had descended from the intestate. As directed by Section 1 the appellee aggregated the interest falling to the appellants under their grandmother's will with that coming to them from their mother under the intestate law. Thus the interest derived under the 1891 trust is taxed in the higher brackets at four per cent whereas had it been created by a will effective after September 1, 1907, the tax would be computed as upon a succession to Mrs. Lawrence's estate alone, and at a rate of one per cent.

The same considerations which have been stated in respect of the 1862 trust are controlling as to this one. We think it an arbitrary and unreasonable discrimination that the beneficiary of a power must aggregate the interest so derived with that enjoyed by inheritance of property owned in fee by the donee of the power, if the instrument creating the power antedates 1907, but need not so

aggregate the interests for the purpose of taxation if the creation of the power be subsequent to 1907. The consequence that the one must pay at a higher rate on the interest falling in at the death of the donee of the power than the other who takes by reason of an exactly similar event, denies the equal protection of the law to the former.

The argument that the act of 1909 tends to render collection of taxes more certain by accelerating the time of payment and making the executors the collectors of the tax is answered by the provisions of Sec. 7 of Chapter 65 of the General Laws (Ter. Ed.). Remaindermen become liable for the tax not at the death of the donor but when they come into possession and enjoyment of the property at the expiration of a life estate or term of years. The tax on their succession is then payable by any fiduciary who then holds the property, and, if none is in office, by the beneficiaries themselves. It cannot therefore successfully be contended that the act of 1909 was adopted with a view to earlier or more certain collection of the tax.

The Commonwealth seeks to support the statutes upon well known principles: that the guaranty of equal protection does not compel adoption of an iron rule of equal taxation, preclude variety in taxation, or forbid classification of subjects if the discrimination is founded upon a reasonable distinction or if any state of facts reasonably can be conceived to sustain it; and that where the evident purpose is to deal fairly and equitably in classifying the subjects of taxation, a statute will not be condemned because of minor and incidental hardships or inequalities due not to a hostile purpose but to ir erent difficulties or inadvertence. The claim is that the discrimination against the appellants is justified by either or both of these principles. While this court always accords great weight to the judgment of a state legislature, we cannot agree that there is here a fair basis for difference of treatment. All that is said in defense of the statute is that it treats alike all those who take under instruments executed prior to an arbitrary past date, and treats alike all those who take under instruments made subsequent to the same arbitrary date, and that the legislature may have found some reason for the discrimination in the state's policy of taxation. But this is merely to say that arbitrary classification which is the result of the exercise of the legislative will must be sustained. The alternative and inconsistent contention that the

discrimination is the result of inadvertence, cannot prevail. The act of 1907 was prospective in its operation. Knowing that that act did not reach successions under deeds or wills effective prior to September 1, 1907, the legislature adopted the acts of 1909 and 1924 to put those who succeeded to remainder interests created prior to September 1, 1907, into a taxable class while leaving wholly exempt or taxing on a different basis and at a different rate remaindermen taking under instruments effective subsequent to September 1, 1907. To suggest that this was an attempt to bring about equality which failed through inadvertence is to be blind to the obvious purpose and intent of the legislature. Action could not have been more deliberate.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 77.—October Term, 1936.

Harriet C. Binney, et al., Appellants,
vs.
Henry F. Long, Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts.

Appeal from the Probate Court of the County of Norfolk, Commonwealth of Massachusetts.

[December 14, 1936.]

Mr. Justice Cardozo, dissenting in part.

I am unable to concur in so much of the opinion of the court as invalidates the tax upon the interests passing to the appellants under the deed of 1862 and reduces the amount of the tax under the will of 1891.

On September 1, 1907, the Commonwealth of Massachusetts laid a tax upon the subject of any transfer to take effect in possession or enjoyment after the death of a donor, whether the succession was brought about by will or intestacy or gift *inter vivos*. Acts 1907, c. 563. This court held in *Coolidge* v. *Long*, 282 U. S. 582, that as to remainders already vested, but dependent upon an estate for life, the tax so imposed is a denial of due process, though the life estate did not end until after the passage of the statute. In 1909 the legislature of the Commonwealth enacted another statute providing in substance that where the transfer becomes complete through the exercise or non-exercise of a power of appointment (cf. *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 270, 271; *Guaranty Trust Co.* v. *Blodgett*, 287 U. S. 509, 511) the succession shall be deemed to have been derived from the donee of the power, if the power had its origin in a disposition of property made before September 1, 1907, and if made after that date, from the donor of the power. Acts 1909, c. 527, § 8: G. L. (Tercentenary Ed.) c. 65, § 2. Is the result of that amendment an unlawful discrimination when applied to the deed of 1862 and the exercise or non-exercise of the power there created?

If succession must be treated as derived from the donor, irrespective of the date when the power was created, many interests will go free that in fairness should contribute their quota to the fisc.

"Whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it." *Matter of Dows,* 167 N. Y. 227, 231; aff'd sub. nom. *Orr* v. *Gilman,* 183 U. S. 278, 287; *Matter of Delano,* 176 N. Y. 486; aff'd sub. nom. *Chanler* v. *Kelsey,* 205 U. S. 466, 478. This court has held that a legislature does not violate the Fourteenth Amendment by giving heed to these realities when taxing a succession. *Orr* v. *Gilman,* supra; *Chanler* v. *Kelsey,* supra. The cases that have been cited had their origin in New York. For a time the tax laws of Massachusetts were drawn along stricter lines. *Emmons* v. *Shaw,* 171 Mass. 410, 413. Until the Act of 1909, a transfer through a power, if made under an instrument effective before September, 1907, escaped taxation altogether, though the gift in substance and reality may have had its origin thereafter. Acts 1907, c. 563, sec. 25; cf. *Saltonstall* v. *Saltonstall,* supra; also *Saltonstall* v. *Saltonstall,* 256 Mass. 519, 522, 525. This was unfair to the Commonwealth. It was perhaps unfair to legatees who were taxable under gifts of later date. But the evil, however patent, was not subject to correction through the medium of a uniform rule taxing the succession under every power of appointment exercised thereafter, and taxing it as derived from the primary donor. Such a method of assessment would be adequate in its application to instruments to be executed in the future, but quite inadequate as to instruments executed in the past. There was need for a distinction based on difference in time.

One may take for illustration a will made in 1914, seven years after the Act of 1907, and another made in 1900, seven years before. Each, let it be assumed, provides for a life estate, with power to the life tenant to appoint the remainder, and with a gift over to children in default of an appointment. The life tenants die in 1921. If an assessment is made upon the right of succession under the will of later date, there will be no difficulty in collecting the tax, economically and swiftly, out of the estate of the donor. The power having been created after 1907, the executors will be under a duty to retain so much of the estate as may be necessary to pay the tax in full. But in respect of the 1900 will, the situation is very different. The probability is that before the adoption of the statute the executors under that instrument will have been given their dis-

charge. In that event the probate court will no longer have control of the estate, and the Commonwealth will be left to a precarious remedy against remaindermen deriving their possession through the non-exercise of the power, if perchance the failure to exercise it becomes known at all. Estates of subsequent donors will thus be made to bear the burden while those of earlier donors are left substantially immune. The amendment of 1909 corrects that inequality. Has it substituted another to be condemned as more offensive?

The rule is elementary that a state in adopting a system of taxation is not confined to a formula of rigid uniformity. *Swiss Oil Co.* v. *Shanks*, 273 U. S. 407, 413. It may tax some kinds of property at one rate, and others at another, and exempt others altogether. *Bell's Gap R. R.* v. *Pennsylvania*, 134 U. S. 232; *Stebbins* v. *Riley*, 268 U. S. 137, 142; *Ohio Oil Co.* v. *Conway*, 281 U. S. 146, 150. It may lay an excise on the operations of a particular kind of business, and exempt some other kind of business closely akin thereto. *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 62; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 94; *Armour Packing Co.* v. *Lacy*, 200 U. S. 226, 235; *Brown Forman Co.* v. *Kentucky*, 217 U. S. 563, 573; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 255; *State Board of Tax Comm'rs* v. *Jackson*, 283 U. S. 527, 537, 538. What is true of division into classes according to subject matter must be true of division into classes dependent upon time. The temporal arrangement must have its origin, to be sure, in something more than whim or fantasy, a tyrannical exhibition of arbitrary power. If that reproach has been avoided, the classification does not fail because the burdens before and after are not always and everywhere in perfect equilibrium.

From all this it follows that a distinction between wills or deeds effective before 1907 and those effective afterwards—the exercise or non-exercise of powers under instruments of the first class giving rise to a succession to be taxed as a bequest from the donee, and the exercise or non-exercise of powers under instruments of the second class to be taxed as a bequest from the donor—is not rooted in caprice. The point of time which separates the classes is not interjected arbitrarily or by an exertion of brute force, but corresponds to the behests of a rational taxonomy. This being so, the division ought not to fail because the deed of 1862 was framed in such a

way that succession thereunder would not have been taxable to any one, either the estate of the donor or that of the donee, if a like deed had been executed after the passage of the statute. A legislature cannot be expected in drafting legislation to think out every conceivable situation in which the members of one class will bear a heavier burden than the members of another. Under the statute challenged as invalid many deeds *inter vivos* continue to be taxable irrespective of their date. An interest in remainder to take effect in possession or enjoyment through the exercise or non-exercise of a power of appointment after the death of the donor (*Guaranty Trust Co.* v. *Blodgett, supra*) will gain nothing from the fact that a non-testamentary conveyance brought the power into being. The only reason why this particular interest would be exempt if the deed of 1862 had been made after August, 1907, is because the remainder was so limited that the power might be exercised while the donor was yet alive. Such untoward accidents do not take a method of division out of the domain of the rational into the land of whim and fantasy. Eccentricities of incidence are common, and perhaps inevitable, in every system of taxation. The future would have to be scanned with microscopical powers of vision to foresee and forestall every possible diversity. For present purposes it is enough that the order of events removes the stigma of caprice from a system of classification whereby donees of a power before the passage of the act are treated as grantors, the tax to be laid upon that basis, whereas donors of a power are recognized as the source of the succession in respect of transfers afterwards. *Emmons* v. *Shaw, supra.* "And inequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law." *Maxwell* v. *Bugbee*, 250 U. S. 525, 543. Cf. *Metropolis Theatre Co.* v. *Chicago*, 228 U. S. 61, 69, 70; *Salomon* v. *State Tax Commission*, 278 U. S. 484, 491.

What has been said as to the deed of 1862 and the power there created applies with equal force to the will of 1891 and to the quantum of the tax payable by the legatees thereunder.

For these reasons I dissent from the modification of the decree and vote to affirm it.

Mr. Justice BRANDEIS joins in this opinion.